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No. 150

IN THE

Supreme Court of the United States

October Term, 1961

EASTERN AIR LINES, INC., *Petitioner*

v.

CIVIL AERONAUTICS BOARD, AMERICAN AIRLINES, INC., ET AL., *Respondents*

BRIEF FOR RESPONDENTS AMERICAN AIRLINES INC., ET AL. IN OPPOSITION

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EASTERN AIR LINES, INC., *Petitioner*

v.

CIVIL AERONAUTICS BOARD, AMERICAN AIRLINES, INC., BRANIFF AIRWAYS, INC., CONTINENTAL AIR LINES, INC., UNITED AIR LINES, INC., WESTERN AIR LINES, INC., *Respondents*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS AMERICAN AIRLINES, INC., ET AL. IN OPPOSITION

QUESTIONS PRESENTED

In its final order in its first investigation of the general level of passenger fares charged by the major domestic airlines the Civil Aeronautics Board decided the major issues underlying the determination of a proper fare level—the method of computing the carriers' allowable return, the rate of return itself and numerous other controverted issues—and found further that the record was inadequate to permit it to determine whether the existing fare level was or would be unjust and unreasonable or what a proper fare level

would be, because the forecasts submitted by the parties were not reliable indicia of wnat future results would be; it also found that because the air transport industry was in the midst of a period of transition from piston-engine aircraft to turbine-powered aircraft, it would not do any good to reopen the record. Petitioner and these airline respondents had urged the Board in the general fare proceeding not to prescribe a fare level. Outside the confines of the proceeding the Board acted during its pendency to permit the carriers to increase the general level of fares by a greater percentage than petitioner requested in the proceeding. The questions presented are these:

1. Whether, in the circumstances described, the Board was legally required to proceed to a determination of whether the existing level of domestic trunkline passenger fares was or would be just and reasonable and, if not, to prescribe the appropriate level.

2. Whether petitioner is foreclosed from challenging the Board's action by reason of its having failed to raise the objection before the Board, having urged upon the Board the course of action it took and having obtained substantially the relief it requested from the Board.

STATUTES INVOLVED

Besides the statutes set out in the Petition (App. B, pp. 41-47), Section 1006 (e) of the Federal Aviation Act, 72 Stat. 795, 49 U.S.C. § 1486 (e), is pertinent to the case. It reads:

> "The findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered

by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless there were reasonable grounds for failure to do so."

STATEMENT

The *General Passenger Fare Investigation* was instituted by the Civil Aeronautics Board on May 10, 1956. (J.A. 315-24). The stated purpose of the investigation was to determine whether the passenger fares charged by the domestic trunkline air carriers were generally unjust or unreasonable and, if they were found to be unjust or unreasonable, what overall percentage changes in such fares "should be permitted or required." (J.A. 317).[1]

In November 1957 a hearing began before an examiner of the Board. At that time and throughout the rest of the proceeding, petitioner's position was that a 15 per cent increase in the fare level was required. With one exception the other carriers, including these respondents, took the position that the general level of fares should be increased by from 12.5 to 20 per cent.

The hearing of evidence concluded in August 1958, and after receiving briefs the hearing examiner in May 1959 issued an initial decision in which he concluded that the existing fare level was unjust and unreasonable and that it should be raised by 12 per cent above the level in effect prior to February 10, 1958.[2] (J.A. 7).

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[1] References "(J.A. ....)" are to the Joint Appendix, filed in this court by petitioner. References "(Tr. ....)" are to the certified record in the court below.

[2] The significance of this date is explained at p. 6, *infra*.

Exceptions to the Examiner's decision and briefs in support of them were filed by the parties. The Board heard oral argument in July 1959. An attorney for the Air Transport Association, who appeared on behalf of all the carriers including petitioner, told the Board at that argument:

> "I address myself to the form of the order. The position of all of the trunkline respondents is that the order should be permissive and not a mandatory order. That is, it should be an order which permits but does not require each carrier to increase its fare level by whatever percentage you have found to be proper over the pre-existing level, and this would terminate the proceeding.
>
> "No carrier would be precluded under such an order from hereafter adjusting its fares to a lesser or to a higher level. Such adjustment would, of course, be subject to the established and ordinary statutory procedures whereby tariffs for new fares may be permitted to go into effect by the Board or may be suspended and investigated without there being any question as to whether the first step the carrier has to take is to seek to amend the order in some prior proceeding." (J.A. 344).

The attorney concluded by saying

> "On this record, it seem[s] perfectly clear that there is no necessity to enter a mandatory fare order, but that the entire thing could be handled within the framework of Section 1002(c)."[3] (J.A. 345).

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[3] The intended reference was presumably to Section 1002 (g) of the Federal Aviation Act, which provides for suspension and investigation of tariffs filed by carriers.

Petitioner had taken the same position—that no mandatory order fixing fares should be entered—in its own briefs. (Tr. 343, 344A, 382, 452-53).

The Board entered its final order on November 25, 1960. (J.A. 1-314). It resolved the major issues in the case, including the appropriate method of computing the return to which the carriers were entitled, the rate of return, the elements to be included in the carriers' rate base, the proper method of computing depreciation, the propriety of the use of standard cost and load factor figures, the treatment of income taxes deferred by reason of the liberalized depreciation provisions of Section 167 of the Internal Revenue Code and other matters.

It found, however, that the record was inadequate "to permit the fixing of the fare level." The reason for this was that the parties had not submitted operations, revenue and expense forecasts that were "reliable indicia of what future results will be." (J.A. 8). The Board concluded furthermore that "no useful purpose would be served by reopening the record at this time in order to introduce evidence of current operations." This was because the air transport industry was in an unsettled stage of transition from piston-powered to turbine-powered aircraft so that "meaningful data useful for determination of appropriate fare levels for representative, relatively extended periods are [not] now available." (J.A. 59).

Alone among the parties petitioner, within the time allowed for petitioning for reconsideration of the Board's decision, filed with the Board a letter in which it said it was not petitioning for reconsideration but that

> "there are some matters in that decision with which Eastern disagrees and, lest its silence be construed as acquiescence, certain of those points of disagreement will be specified in this letter." (J.A. 347).

Petitioner then proceeded to set out a number of issues the Board had resolved and recorded its disagreement with the way in which they were resolved. At no point in the letter was there any mention of the Board's failure to make the findings and enter the order of which petitioner now complains nor was there any request that the record be reopened.

* * *

During the pendency of the *General Passenger Fare Investigation* the Board acted to permit the carriers to effect an increase in the general fare level substantially greater than the 15 per cent increase sought by petitioner in the investigation.

The Board permitted the filing of tariffs providing for an increase of 4 per cent plus $1 per ticket on February 10, 1958, and its action was premised in part on the rate-of-return evidence received in the *Fare Investigation*. See CAB Order No. E-12203, Feb. 25, 1958. The effective increase amounted to about 6.6 per cent. In April 1960 the Board announced by press release its tentative decision in the *Fare Investigation* (which in fact was adhered to in the final decision). Among other things the release said the Board had found appropriate for the industry as a whole a significantly higher rate of return on investment than the carriers were then realizing and than the Board had theretofore used in gauging the reasonableness of fare proposals. Shortly thereafter,

in response to individual carrier tariff filings the Board announced it would permit a general fare increase of 2½ per cent plus $1 per ticket, amounting to about 5 per cent. Tariffs so providing were filed for effectiveness July 1, 1961.

In the fall of 1958 the Board had allowed to go into effect without suspension tariffs eliminating the 10 per cent roundtrip discount and reducing the family-fare discount from 50 per cent to 33 1/3 per cent. This increased the carriers' revenue passenger yield by about 3.5 per cent.

* * *

Petitioner petitioned for review of the Board's order, asserting that the Board was bound to make a finding as to the reasonableness of the fare level and prescribe a level if it found the existing level unreasonable. These respondents intervened in support of the Board's position. The Court of Appeals for the District of Columbia unanimously affirmed the Board's order. (Pet., pp. 35-40). Although petitioner had relied principally upon a recent decision of a differently-constituted panel of the same court, it did not petition for rehearing or rehearing en banc.

REASONS FOR DENYING THE WRIT

Petitioner's arguments for granting the writ amount to no more than a recasting of its arguments on the merits in the Court of Appeals, on which it did not prevail. It has alleged no conflict of circuits and has advanced no other reason for granting the writ. Moreover, although the court below correctly disposed of the merits of the case, the merits should not have been reached and likely would not be reached in this

Court because petitioner did not present its objections to the Board and obtained from the Board the relief it requested and more.

1. The first reason assigned for granting the writ is that the Civil Aeronautics Board has a duty to assure just and reasonable fares and that the petition "presents the basic issue of whether a Federal regulatory agency may shirk, as it chooses, one of the regulatory functions assigned to it by Congress." (Pet., p. 10). No such issue is posed. The court below recognized the existence of the duty petitioner asserts (Pet., p. 38) but held quite correctly:

> "The duty of the Board to prevent unjust and unreasonable rates, and to establish those that are lawful, does not require that the duty be performed as a result of this particular investigation. We cannot say that the Board decision not to decide the question of justness or reasonableness of the general level of trunkline fares requires this court to compel the Board to do so on this record or as it might be enlarged at this time, especially in view of the changes now under way in the industry. The Board's duty is to be performed in the context of particular proceedings. It is not mandatory in this one." (Pet., p. 40).

It bears emphasis that the proceeding before the Board was the first investigation of the general level of airline passenger fares ever undertaken by it. As such, it posed to the Board and the parties an almost bewildering complex of first-impression issues, which were exhaustively probed on the evidentiary record and on briefs and oral argument.

At issue, for example, were whether the traditional rate base-rate of return method of measuring the

proper level of carrier earnings was appropriate for the air transport industry, what a proper return would be, the elements of the carriers' rate bases, the capital structure (relative proportions of long-term debt and equity) that should be assumed for the carriers, the computation of depreciation expenses, the treatment of federal income taxes deferred by use of the liberalized depreciation methods allowed by Section 167 of the Internal Revenue Code, the period over which the carriers should be given the opportunity to earn the return found needed, and the intricacies of prescribing or permitting a single general level of fares for a highly competitive industry whose members have differing earnings opportunities.

The Board's problem was further complicated by the fact that the investigation began at a time when a revolutionary change in the technology of the industry, the conversion from piston-engine aircraft to turbojet and turboprop aircraft, was imminent. The evidentiary record was closed before the carriers had had any substantial experience with the new types of aircraft, whereas by the time the Board's decision was rendered, the transition to the new craft was in full swing, with all the uncertainties and unusual expense and revenue problems attendant upon such a transition.

The Board did resolve the basic issues to which we have referred, underlying the determination of the proper fare level, and in the circumstances it was reasonable for it to find and conclude that "it would be futile" to take the further step—"to attempt to prescribe the appropriate fare level on the basis of the record herein" (J.A. 8)—or to attempt at a transi-

tional stage in the industry's history to bring the record up to date.

Like most regulatory statutes, the Federal Aviation Act (and its predecessor, the Civil Aeronautics Act) contemplates that the responsibility for setting fares resides primarily and initially with the carriers. See Section 403 (a), 72 Stat. 758, 49 U.S.C. § 1373 (a). The Board has a number of techniques available under the statute with which to exercise its duty to ensure that fares are lawful under the criteria of the Act. It can investigate newly-filed carrier tariffs and, in connection with such investigation, suspend their effectiveness for up to 180 days. See § 1002 (g), 72 Stat. 788, 49 U.S.C. § 1482 (g). It can, as it did during the course of the *Fare Investigation,* suspend such tariffs and at the same time let it be known what tariffs it would permit to go into effect. For example, when the Board suspended certain carrier tariff filings for higher fares that followed the announcement of its tentative decision in the *Fare Investigation*, which included a finding that a proper return on investment for the industry as a whole was 10.5 per cent, the Board said it would permit tariffs embodying an increase of 2½ per cent plus $1 a ticket and added:

> "We believe that this increase should afford the industry the opportunity to achieve a return on investment of at least 10.5 percent during a reasonably extended period in the future." Order No. E-15436, June 23, 1960, p. 2.

Or the Board can investigate fares embodied in tariffs already filed (without suspension) to determine their lawfulness. See § 1002 (d), 72 Stat. 788, 49 U.S.C. § 1482 (d). But how the Board will perform its duty is within its discretion. Acceptance of peti-

tioner's first argument would lead to the conclusion that the Board could be compelled by mandamus at any time to investigate and determine the lawfulness of carrier fares. There is no support for such a doctrine.

2. Petitioner's second argument is that the Board, having received an examiner's decision, exceptions, briefs and argument, was bound to determine the reasonableness of the fare level. The contention rests upon *Minneapolis Gas Co.* v. *FPC*, D.C. Cir. No. 15452 March 9, 1961, decided just a few months earlier by a differently-constituted panel of the same court that rendered the decision of which review is now sought. The court below (acting through a panel that included Judge Prettyman, the author of the *Minneapolis Gas* opinion) had no difficulty in distinguishing the case. And petitioner did not seek a rehearing en banc to have what it now would term a conflict resolved. In any event, an alleged conflict of decisions within a circuit, especially when the en banc procedure is available, does not present a case for this Court.

In the *Minneapolis Gas* case the Power Commission suspended a rate increase filed by a natural gas producer and entered upon an investigation. After a hearing the Commission's examiner decided that producer had not met its burden of proof. The case went before the full Commission on exceptions to the examiner's decision and argument. The Commission then terminated the proceeding without making a decision and thus allowed the increased rates to go into effect. An aggrieved customer petitioned for review, and the court held that the Commission had erred. The rationale was that the Commission had gone too far in the course it had chosen to revert to its discre-

tionary power simply to allow the increased rates to go into effect and thereby deprive the customer of effective judicial review or any other effective remedy.

In its opinion in this case the court below properly distinguished the cases.

> "In the end our question is whether in the present proceedings the Board reached a point where it could not lawfully exercise a discretion to terminate the proceedings. In a narrow procedural sense the point reached was similar to that reached in *Minneapolis Gas,* but the differences in the two proceedings render the procedural point reached in the two cases of quite different significance. This case was a general investigation of the general level of the passenger fares of all the trunkline carriers. It was not an inquiry into the justness and reasonableness of increases in rates set forth in a particular new tariff filed by a carrier. Moreover, as the investigation progressed changes in the airline carrier industry were occurring in such important and relevant respects—particularly, the transition to turbine-engine craft—that the Board felt unable at this time to accomplish on the available data what initially it had set out to do." (Pet., pp. 39-40).

There is another distinction of prime importance.

The Board's decision in the *Fare Investigation* left petitioner or any other carrier free to file a tariff embodying the fare level that it considered just and reasonable. The Board could suspend such a tariff, but it could not finally disapprove it without affording the carrier an opportunity for a hearing and making findings, based upon an evidentiary record, as to whether the fares proposed by it were just and reasonable; if the carrier considered itself aggrieved by the

Board's decision, it could secure judicial review thereof. It was the aggrieved customer's lack of any such remedy that led the court to decide the *Minneapolis Gas* case as it did.

3. In the court below it was urged by the Board and by these respondent carriers that the petition for review should be dismissed because petitioner had not only failed to make any timely objection to the action of the Board of which it was complaining but even invited that very action and had secured all the substantive relief it sought. The Board also urged that because its order did not change any existing fare, command any such change or require anyone to take any action, petitioner was not adversely affected by it and therefore its petition should be dismissed.

The court noted the latter contention (Pet., p. 40) and held that petitioner had "a substantial interest" in the order so as to entitle it to have it reviewed. The former contention was not adverted to, but it is so compelling that this Court almost certainly would not reach the merits of petitioner's case were it taken.

Section 1006 (e) of the Federal Aviation Act provides that "no objection to an order of the Board . . . shall be considered by the court unless such objection shall have been urged before the Board . . . or, if it was not so urged, unless there were reasonable grounds for failure to do so."

Section 1006 (e) is expressive of a policy, the same policy that requires the exhaustion of administrative remedies before recourse is had to judicial remedies, *FPC* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 499, that is embodied in other federal statutes and judi-

cial decisions governing review of administrative decisions.

> "We have recognized in more than a few decisions, and Congress has recognized in more than a few statutes, that orderly procedure and good administration requires that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts. . . . Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *United States* v. *Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37.

Petitioner's position is far less ingratiating than that of the usual administrative litigant who is precluded from making an argument in court because, for tactical reasons, or on account of carelessness, imprecision or lack of foresight, he failed to present a particular objection to the agency, while attacking its action generally. Here petitioner argued strongly for the result it now seeks to attack.

In its first formal pleading in the *Fare Investigation* petitioner maintained that "the carriers should be in position to be able promptly to adjust their rates to changing conditions, particularly in view of their reasonably foreseeable requirements for transition into the jet age." (Tr. 343). One of the problems created by a mandatory order fixing fares would, of course, be that it would make impossible the prompt adjustments that petitioner then and throughout the proceeding believed necessary and desirable.

In its brief to the examiner petitioner went so far as to question whether the Board should regulate passenger fares at all and asked the Examiner to make findings on that issue. (Tr. 382).

Subsequently, in its memorandum in lieu of brief to the Board petitioner expressed the hope that

> "the Board will limit its order to a finding that the fares produced by the fifteen per cent increase will be just and reasonable, without prescribing maximum lawful fares. This would leave the Board free to consider future adjustments as tariffs are filed by individual carriers, as is contemplated by the Act, without having at the same time to reopen this proceeding for amendment of a maximum rate order." (Tr. 452-53).

Then, in oral argument on behalf of petitioner, these respondents and the other carrier parties, the matter was spelled out in such detail and with such clarity that the Board could not have been left in doubt as to the form they wished its order to take. Mr. Stratton, counsel for the carriers, said:

> "The position of all of the trunkline respondents is that the order should be permissive and not a mandatory order." (J.A. 344).

Further,

> "it should be an order which permits but does not require each carrier to increase its fare level by whatever percentage you have found to be proper over the pre-existing level, and this would terminate the proceeding." (*Ibid.*)

Such a permissive order

> "would, in our view, be sound because it would preserve the statutory scheme. This scheme pro-

> tects the public against fare changes which have not been specifically screened by the Board and if necessary suspended, [their effectiveness] deferred and fully investigated. At the same time, it assures that the carrier can get a definite answer one way or the other to a proposal it has to make with respect to a change in fares within the specified time, which is in effect 210 days from the date of the filing of the tariff. At the same time, it gives the Board a reasonable opportunity to examine any proposal that is made by any carrier as to a change in fares." (J.A. 344-45).

A Board member inquired:

> "You are in effect proposing almost a simple statement or press release stating in effect that the Board will not suspend tariffs provided they meet Section such-and-such?"

Mr. Stratton replied:

> "I think it could go further than that. I think you could make a finding that as of now a fare level to whatever increase you are specifying would not be unjust or unreasonable or unlawful. You state that you would [permit] tariffs providing for that, and this terminates the p[r]oceeding. This is without prejudice if these tariffs are filed within a reasonable time after the proceeding."

The same Board member asked whether the Board had statutory power "to do these things, without specific maximums and minimums." Mr. Stratton answered, "I would think so." (J.A. 346).

That was the state of the record when the Board, having meanwhile permitted fare increases aggregating more than the 15 per cent requested by petitioner,

came to decide the case. It issued an order that in substance if not in form was just what the carrier parties, including petitioner, had requested. In form it differed because the Board could not determine on the record what, if any, further increase in fares—beyond the more than 15 per cent already allowed—should be permitted. In substance it was the disposition proposed by the carriers because it provided them with the raw materials with which to assess the compatibility of any fare proposals they might have to offer with the Board's policies and allowed them the freedom they had so vigorously sought to initiate such proposals in the ordinary manner contemplated by the statute. The Board had been given no reason to think that the form of its order would be objectionable to any carrier; indeed, it had been led to believe that it accorded with the wishes of all of them.

Still there remained one more opportunity for petitioner if it had by then changed its mind as to the appropriate disposition of the *Fare Investigation*, to make its views known to the Board. The Board's Rules of Practice allow petitions for reconsideration to be filed within 20 days of the service of final orders. Petitioner filed a letter within the time permitted, stating it was not seeking reconsideration but was merely listing certain areas of disagreement with the Board's decision. (J.A. 347-50). The failure to make findings as to the justness and reasonableness of existing fares or to prescribe a fare level or reopen the record was not listed.

Of course, the letter contained the usual disclaimer that the list was meant to be exhaustive, and petitioner said it reserved "for this case and any appeals thereof,

and for all future proceedings, all rights, contentions, objections and positions which it has herein." (J.A. 350). But that reservation had no effect on the point petitioner now seeks to make. No "contention, objection or position" consistent with its argument in the court below or this Court had ever been made or taken by petitioner in the proceeding.

Finally, as we have pointed out by a series of increases in the over-all fare level permitted by the Board during the pendency of the *Fare Investigation*, the fare level was increased to a point somewhat higher than the level that petitioner contended throughout the proceeding would be just and reasonable. (See pp. 6-7, *supra*).

We do not contend that the Board, particularly in an investigation undertaken on its own initiative, is bound by the pleadings of the parties to the investigation. But certainly it owes no duty to a party to go beyond its pleadings in determining what relief to afford. It is of no practical consequence to petitioner that the fare level for which it contended was not formally found "just and reasonable" by the Board; that fare level is in effect and cannot be changed contrary to petitioner's wishes (so far as its own fares are concerned) without notice and an evidentiary hearing. On the other hand, if petitioner's fear is that its competitors can adjust their fares in the absence of a prescription of fares by the Board, the fact is, as we have shown, that Eastern went to great lengths to persuade the Board not to freeze its competitors' fares by prescribing the fare level for which it was contending as *the* single just and reasonable level.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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